

1719068 (Migration) [2018] AATA 4528 (27 September 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1719068

MEMBER: Michelle East

DATE: 27 September 2018

PLACE OF DECISION: Perth

DECISION: The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 27 September 2018 at 12:16pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – Federal Circuit Court remittal – genuine and continuing relationship – spousal relationship – marriage certificate – evidence of business relationship – relationship with step children – treatment to conceive a child – inconsistent and conflicting evidence – unconvincing explanations for discrepancies – applicant credibility – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359AA

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cls 309.211, 309.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 14 November 2014 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 14 March 2014 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the visa applicant and her sponsor, the review applicant were in a genuine and continuing relationship.
4. The review applicant sought review of the delegate's decision and on 18 December 2015 the Tribunal affirmed the decision under review.
5. [In] 2017 the Federal Circuit Court of Australia concluded the Tribunal's decision was affected by jurisdictional error because it failed to take into account a relevant consideration or issue, namely whether the review applicant and visa applicant saw their relationship as a long-term one. The Court afforded the review applicant prerogative relief by way of writs of certiorari and mandamus. The matter was remitted to the Tribunal to reconsider and determine according to law.
6. The review applicant appeared before the Tribunal on 6 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant by telephone.
7. The review applicant was represented in relation to the review by his registered migration agent.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

9. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together,

or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. A certified copy of a marriage certificate indicating that the parties' marriage was registered in the Cameroon Embassy in [Country 1 in] October 2013 was provided. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

12. The Tribunal has had regard to the financial aspects of the relationship including joint ownership of assets and joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party and any sharing of day to day household expenses.
13. The review applicant in his oral evidence said he had not needed to provide further financial assistance to his wife since the last hearing because he had set her up in her business which then sustained her and continued to do so.
14. The Tribunal questioned the review applicant about the money previously provided to the visa applicant prior to the commencement of their relationship. The review applicant said after having a chance meeting with her in 2010, he decided he needed a new wife in early 2012 and his friend said the visa applicant would make a good wife. He said he then started talking to her in January and February 2012, prior to his travel to [Country 1] and decided at that time to give her the money for her business. The review applicant agreed this was prior to them establishing any form of romantic attachment. The Tribunal is of the view that this lends support to the argument that this payment was more in the nature of a business arrangement rather than a provision of financial support such that would be expected in a genuine spousal relationship.
15. The review applicant in his oral evidence said he had not provided any direct financial support to his wife since 2015 other than travelling there with her and paying for her air tickets to Cameroon in late 2016.
16. The visa applicant when questioned said her husband had paid for renovations to her mother's house in Cameroon in 2015. She also said he paid for her to go to Cameroon in 2017 and to [Country 2] in December 2017. The review applicant gave no evidence as to these payments and this clear inconsistency was put to the review applicant pursuant to section 359AA of the Migration Act and 14 days within which to respond was provided. The review applicant provided a sworn statutory declaration dated 19 June 2018 attaching a receipt for a money transfer to a third party in Cameroon dated 3 February 2016 which he stated was for the renovations to his mother in law's house. There is a notation on top of the receipt saying 'Copy of Money Transfer to [another person], for the purchase of plot, my niece completed the money'. The notation doesn't indicate that it was for renovation purposes. There is nothing to indicate that this money was for the purposes of renovation or has any connection with the visa applicant.
17. The Tribunal is not satisfied on the basis of the evidence submitted that the review applicant paid for the renovations to the visa applicant's mother's house.

18. The visa applicant in her statement dated 29 March 2017 (provided after the hearing) said she and the review applicant had bought a piece of land in Cameroon as a family. This evidence was not corroborated by independent documentary evidence or the evidence of the parties at the hearing. The Tribunal does not accept this statement as evidence indicating a pooling of the parties' financial resources.
19. With respect to the payments for the trips to Cameroon in late 2016 and early 2017, the review applicant attached reservation confirmations from the airline. Whilst the reservation details for the flights were emailed to the review applicant, there is nothing on the reservations to indicate the review applicant's payment apart from him being listed as an emergency contact. In the absence of corroborative documentary evidence the Tribunal is not satisfied the review applicant paid for these tickets. One hotel receipt dated [in] July 2018 was provided by the parties addressed to '[name]' for payment for 3 nights' accommodation in [Country 3]. When compared with documents provided of travel booked by the review applicant for both parties to travel to [Country 3] in June 2018 and the review applicant's passport, the review applicant was only in [Country 3] [during] June 2018. The visa applicant appears to have had her procedures done in [Country 3] during July 2018. The Tribunal finds the evidence presented to be confusing and inconsistent and does not accept it as evidence that would indicate a pooling of financial resources.
20. A 'Deed of Suretyship' was also provided which effectively nominated the review applicant as guarantor for the visa applicant's lease. The Tribunal accepts this is prima facie evidence of a financial legal obligation owed by the review applicant to the visa applicant. The review applicant's oral evidence was that he was present during the lease negotiations with the visa applicant in [Country 1]. The visa applicant said the review applicant was not with her and all documents were sent to him for his scrutiny and signature. The Tribunal notes the document is signed by the review applicant in Australia [in] May 2017. This inconsistency was put to the review applicant pursuant to section 359AA of the Migration Act and 14 days within which to respond was provided.
21. The review applicant in his statutory declaration dated 19 June 2018 changed his evidence to agree with his wife, citing his poor memory and he realised he must have signed it in Australia because his witnesses were here.
22. The Tribunal does not accept this explanation. The review applicant's demeanour in the hearing was definite when giving his evidence causing the Tribunal at that time no doubt of his belief in that evidence. It was only when challenged with the inconsistency with the visa applicant's evidence together with the obvious discrepancy he discovered on the documents that he changed his evidence.
23. The Tribunal has had regard to the evidence previously led at the prior hearing. Namely, there was evidence of telegraphic transfers in 2012, 2013 and 2014. Further evidence was provided of funds provided by the review applicant to the visa applicant over the course of their relationship.
24. The Tribunal is not convinced that the evidence provided of financial arrangements between the parties is evidence of a pooling of financial resources such that would be consistent with a genuine spousal relationship. The initial payments from the review applicant to the visa applicant are more indicative of a business relationship and the review applicant's own evidence was to the effect that he helped her establish herself in her business and financially so that she would be able to support herself. Whilst there is evidence of some transfers and payments from the review applicant to the visa applicant, the Tribunal does not accept that this indicates a pooling of financial resources or sharing of day to day expenses.

25. The review applicant in his statutory declaration dated 19 June 2018 stated the visa applicant is 'one of the beneficiaries of my superannuation'. No documentary evidence supporting this statement has been provided. The Tribunal is of the view that this evidence can be easily obtained and does not accept the applicant's statement as evidence of any financial obligation from the review applicant to the visa applicant.
26. Whilst the Tribunal accepts that it is difficult for two parties living in separate countries to establish joint finances, the Tribunal is not satisfied that at the time of application or at the time of decision there is sufficient evidence to show a sharing of financial resources and expenses such that would indicate a genuine spousal relationship.
27. After considering the evidence presented, the Tribunal finds there is insufficient evidence of joint ownership of assets and joint liabilities. The Deed of Suretyship referred to in paragraph 20 is prima facie evidence of a financial liability from the review applicant for the visa applicant, however, as evidenced by the review applicant's own evidence, the financial arrangements between the parties in relation to the [business] were in the nature of a business relationship, not one that would be expected in a genuine spousal relationship. The parties have not established joint bank accounts. The Tribunal further finds that even though there had been some transfers of money from the review applicant to the visa applicant, this does not indicate a pooling of financial resources or sharing of day to day expenses. The parties have provided evidence to demonstrate payment of some expenses by the review applicant for the visa applicant, however the Tribunal found the evidence to be confusing and inconsistent and does not accept the evidence provided as evidence of sharing of day to day expenses.
28. The Tribunal acknowledges it is difficult for two people living in two separate countries to acquire property in joint names, open joint bank accounts and borrow money jointly. The Tribunal therefore places little weight on this factor.
29. The Tribunal has had regard to the nature of the household, including any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework.
30. The visa applicant in her statement dated 29 March 2017 provided subsequent to the hearing said that they live together in the visa applicant's apartment in [Country 1] and the visa applicant does everything 'a good house wife does'. She said they shop for groceries together and watch music videos when at home. The review applicant did not provide corroborative evidence in his statutory declaration provided subsequent to the hearing or oral evidence to the same effect in the hearing.
31. The Tribunal is unable to find on the limited evidence provided that at the time of the visa application or time of its decision, the parties share a house when the review applicant is visiting or that they share any housework whilst he is there.
32. Evidence provided at the previous Tribunal hearing concerned the bond between the visa applicant and the review applicant's children. The Tribunal queried and the review applicant responded that the children were now aged [age] and [age]. Initially he described the relationship between the visa applicant and his children as 'cordial'. He then said she contacted them 3 times per week and provided all the emotional support they needed.
33. The visa applicant spoke in loving terms of her step children and the need for them to have her maternal influence.

34. The visa applicant stated that she spoke to the children once per week on the weekend. This inconsistency was put to the review applicant pursuant to section 359AA of the Migration Act.
35. The review applicant again responded by way of statutory declaration dated 19 June 2018. Again he agreed with the visa applicant's version of events and said he couldn't exactly recall how often it was and often the kids would say hello when he was talking.
36. The Tribunal does not accept this explanation. The questions were not difficult and the Tribunal is of the opinion that these relatively simple questions should be able to be answered with ease.
37. The Tribunal is not satisfied based on the evidence submitted that there is joint responsibility for the care and support of the children either at the time of the visa application or at the time of its decision.
38. Prior to the hearing the review applicant's representative advised she had been instructed that the review applicant is bound by cultural requirements to produce a common child with the visa applicant and that the visa applicant was approaching menopause, although no medical evidence supporting this contention was provided. Given the visa applicant is [age] years of age the Tribunal accepts she would have declining fertility. Evidence was provided of the parties travel to [Hospital 1] for IVF treatment in June 2018. Several invoices and receipts were provided to the Tribunal after the hearing from [Hospital 1] in [a city in Country 3] for IVF treatments for the visa applicant. The documents identify the visa applicant as the patient for IVF. There is no evidence however to indicate the review applicant paid for the treatments or that he was present during the procedures. In fact, as outlined in paragraph 19 above, the review applicant's passport indicates he left [Country 3] [in] June 2018. Email correspondence from the hospital is addressed to both parties. This communication took place during what appears to be an initial enquiry stage.
39. Further evidence was provided after the hearing. A flight itinerary for the review applicant to travel to [Country 3] from [dates in] September 2018 together with various receipts addressed to both the review applicant and visa applicant for various tests undertaken purportedly for IVF treatment. The covering email from the representative stated 'this is new evidence that the sponsor went to [Country 3] again to assist his wife to undergo the second VIF treatment' (sic).
40. The review applicant had an invoice dated [September 2018] for a semen analysis. The visa applicant was having an ovum pick up [in] September 2018. The visa applicant had further scans and was scheduled for embryo transfer [in] September 2018. It appears from the documents provided that the review applicant was only present for a short period of time to facilitate production of semen.
41. Evidence was provided of the visa applicant suffering a miscarriage due to a blighted ovum in December 2016. The date of conception and miscarriage accord with the review applicant's travel records such that conception took place whilst the review applicant was in [Country 1].
42. The Tribunal accepts the parties have had at least one pregnancy which did not progress. The Tribunal is also prepared to accept on the evidence provided that the parties have taken steps to have a child together via IVF. Despite this however, a pregnancy does not equate to a genuine and committed relationship and the fact of the intended pregnancy alone is not sufficient to satisfy the Tribunal of the genuineness of the relationship.

43. The Tribunal has had regard to the social aspects of the parties' relationship including whether the parties represent themselves to other people as married to each other, the opinion of friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.
44. The parties provided hospital admission forms dated [in] December 2016 to the Tribunal which noted the review applicant as the visa applicant's next of kin.
45. Both parties gave oral evidence that when the review applicant is visiting [Country 1] the visa applicant works from Monday to Saturday and then spend Sunday together. They go to church together in the morning and then do various things such as going to the movies in the afternoon.
46. No further evidence was provided to the Tribunal of the social aspects of the parties' relationship other than the parties' own oral evidence. For the reasons outlined below the Tribunal is unable to rely on the parties' own evidence. In many respects the review applicant's evidence was inconsistent and vague and whilst explanations have been given for those inconsistencies, the Tribunal is not sufficiently persuaded by the explanation. As such, without independent corroborative documentary evidence either in the form of statutory declarations from friends and family or other government forms the Tribunal is not prepared to find at the time of the visa application and at the time of its decision that the social aspects of the parties' relationship is consistent with a genuine and committed spousal relationship. The Tribunal notes that the review applicant was listed as the next of kin on the visa applicant's hospital admission form, however, as outlined above, whilst the Tribunal is prepared to accept the review applicant was the father of the visa applicant's unborn baby it is not prepared to find that this alone is consistent with a genuine and continuing spousal relationship.
47. The Tribunal notes the evidence led at the previous hearing satisfied that Tribunal that the social aspects of the parties' relationship was consistent with a genuine spousal relationship, however due to the concerns the Tribunal has regarding the credibility of the parties' evidence, the Tribunal is not satisfied at the time of the visa application and at the time of its decision that the parties are known to friends and acquaintances as being in a spousal relationship, that they plan and undertake joint social activities and that they represent themselves to other people as being married to each other.
48. The Tribunal has had regard to the evidence provided relating to the parties' intentions as to the nature of the parties' commitment to each other, including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long term.
49. Since 2015 the review applicant has travelled offshore for one week in January 2016, 10 days in April 2016, two months from October – December 2016 and one month in April 2017.
50. In his oral evidence the review applicant confirmed he had only travelled to [Country 1] when he left Australia.
51. When questioned, the review applicant was extremely vague in answering when he had visited his wife. He said he saw her twice in 2016 for 2 months around the middle of the year and then went back later on in the year. He said he saw her for a month in 2017. The Tribunal had access to the review applicant's movement records which reflects him being offshore for one week in January 2016, 10 days in April 2016, 2 months from October – December 2016 and one month in April 2017. The visa applicant gave roughly similar evidence to that of the review applicant. This inconsistency was put to the review applicant

pursuant to s 359AA of the Migration Act and he was given a period of 14 days within which to respond.

52. The review applicant in his statutory declaration dated 19 June 2018 confirmed the dates of travel.
53. The Tribunal also requested either the review applicant's original passport/s to be produced or for certified copies to be provided. Initially the representative only supplied a photocopy of the review applicant's passport and another request was made for a certified copy or the original to be produced. The review applicant subsequently produced the original to the Tribunal.
54. It is of great concern to the Tribunal that the review applicant was unable to remember when he saw his wife (the visa applicant) during 2016, particularly during what was supposed to be a difficult time of pregnancy and premature termination of that pregnancy. Given the very limited time the parties have spent together since marrying, it is concerning that the times they were together was unable to be recalled.
55. The Tribunal asked the review applicant if he had seen his own or his wife's family since 2015. He said he had not been in Cameroon since that time. It had been the Tribunal's understanding of his evidence that he said neither he nor his wife had seen each other's family since that time. The visa applicant said she went to Cameroon and saw the review applicant's family in 2017. This apparent inconsistency was put to the review applicant pursuant to s359AA of the Migration Act. The review applicant explained this discrepancy in his statutory declaration dated 19 June 2018 and the Tribunal accepts that explanation.
56. The Tribunal questioned each party how often they spoke to each other and requested records of their communication over a sample period of the last 3 months. A sample of their call history was provided.
57. The Tribunal again questioned the parties along similar lines to the previous Tribunal as to when they decided to marry. Both parties said it was in September 2012. This Tribunal referred to paragraph 46 of the Tribunal's decision dated 18 December 2015 in which the review applicant had given evidence at that time that he had decided to marry the visa applicant in February/March 2012. This inconsistency was put to the review applicant pursuant to s359AA of the Migration Act and a response was provided by way of statutory declaration dated 19 June 2018. The review applicant in his response said that the decision to get married was not one made at a particular time or date. He said they started to discuss in late 2012 and continued to 2013. He stated about mid-September 2013 they planned to get married in October 2013.
58. This evidence again is inconsistent with that given in the second hearing and also the first hearing. At the initial hearing they said the decision was made in early 2012. At the second hearing it was late 2012. His statutory declaration indicates it was more likely to be in September 2013.
59. This has been a live issue for the parties since before the previous Tribunal hearing. Inconsistent answers have been provided throughout the process and the Tribunal is not convinced by the review applicant's explanation for another discrepancy. The Tribunal finds this casts serious doubts on the parties' claim of a genuine relationship having existed at the time of the visa application and at the date of this decision.
60. The parties gave evidence of their plans to be a family and to have children together. The visa applicant spoke of how she wanted to be with the review applicant and spend their life together as a family. Whilst they both said they had a long term commitment to their

relationship the Tribunal remains unconvinced by the evidence. As outlined in this decision the Tribunal has serious concerns about the review applicant's credibility and therefore doubts the claim of the parties having a mutual commitment to one another in a relationship they regard as long term.

61. Specifically, there were multiple inconsistencies in the evidence both between the parties and also their evidence from previous proceedings. Whilst the review applicant has provided explanation by way of statutory declaration the Tribunal is not satisfied as to these explanations. The Tribunal has particular concerns that in a marriage in which they claim to be as loving as they are and in which they see each other infrequently that neither could remember when they saw each other. Most concerning is the period in December 2016 in which the visa applicant conceived a child and then mis-carried the baby and neither party could recall that the review applicant travelled to [Country 1] at that time.
62. This, in conjunction with the other inconsistencies outlined in this decision gives rise to serious concerns about the review applicant's credibility. The inconsistencies were put to the review applicant pursuant to section 359AA of the Migration Act at the hearing and adequate time within which to respond was provided. The Tribunal is not convinced by the explanations given. The Tribunal is therefore not prepared to accept the review applicant as a credible witness.
63. After carefully considering all the evidence in this matter the Tribunal finds that at both the date of visa application and at the time of its decision it is not satisfied the parties have a degree of commitment to each other and derive companionship and emotional support from each other such that would be consistent with a genuine spousal relationship. The Tribunal accepts the parties have known each other since 2012 however remains unconvinced as to how the relationship developed and when key events such as their engagement occurred. Furthermore, the Tribunal is not satisfied that the parties see the relationship as long term. The Tribunal finds the parties have spent very little time together and have not provided convincing evidence of having lived together when the review applicant visited the visa applicant. The Tribunal makes this finding having taken into account the fact the parties live in separate countries.
64. After considering all the evidence the Tribunal is not satisfied that the parties have a mutual commitment to a shared life together to the exclusion of all others, that is genuine and continuing and they live together or that they do not live separately and apart on a permanent basis. The Tribunal is unable to accept the inconsistencies in the evidence of the review applicant both with respect to the visa applicant's evidence and that provided in the previous Tribunal hearing.
65. The Tribunal comes to this conclusion based on the inconsistencies and implausibilities on the evidence before it.
66. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made or at the date of this decision.
67. Therefore the visa applicant does not meet cl.309.211(2) and cl.309.221.
68. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

69. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Michelle East
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).